STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 28, 2004
v	No. 248101 Wayne Circuit Court
GORDON MICHAEL WILSON, Defendant-Appellant.	LC No. 02-014893-01

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and malicious destruction of property valued at $200 or more but less than $1,000, MCL 750.377a(1)(c)(i).[1] Defendant was sentenced to two years' imprisonment for the felony-firearm conviction, and to time served for the felonious assault and malicious destruction of property convictions. We affirm.

Antonio Jenkins was visiting defendant's former girlfriend late one night when defendant knocked on the front door. Although he had his own car parked in the girl's driveway, Jenkins called his cousin, Anthony Plair, and asked him to come pick him up. Jenkins then left the house through another door. While he was waiting outside for Plair, Jenkins saw defendant leave the house and remove a small television that had been installed in Jenkins' car. Defendant was walking toward his own car with the television when Plair arrived. Plair told Jenkins to "get in the car." Defendant put the television in his car, pulled out a gun, and fired two or three gunshots at Plair's car. Jenkins ran through the neighborhood to his aunt's house, arriving at the same time as Plair. They discovered that one bullet had struck the rear driver's side door, and another had struck and shattered the rear driver's side window. They returned to the girl's house and called the police.

The following day, defendant was arrested outside his mother's house. Before putting defendant in the police car, one investigator said to an officer, "now I need to get the handgun."

[1] Defendant was acquitted on the charges of assault with intent to commit murder, MCL 750.83, and assault with intent to do great bodily harm less than murder, MCL 750.84.

Defendant said, "I had a weapon and I fired some shots and I threw the weapon away," or "It's not in there, I already got rid of it. You don't need to tear my mother's house up." They got into the police car, and the investigator advised defendant of his *Miranda*[2] rights. The investigator asked defendant if he would take them to the weapon so that they could retrieve it before a child found it. Defendant told the police where he had thrown the weapon, but it was not recovered.

Defendant first argues that the trial court should have suppressed his custodial statements because they were made during police interrogation before he received *Miranda* warnings. Defendant further argues that his subsequent statements and actions after the reading of his *Miranda* rights should also have been suppressed as the "fruit of the poisonous tree." Because defendant did not move to suppress his statements or object to their admission at trial, this issue is unpreserved. *People v Manning*, 243 Mich App 615, 624-625; 624 NW2d 746 (2000), applying *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). To avoid forfeiture of the issue defendant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We will only reverse defendant's convictions if he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

It is undisputed that defendant was in custody when he made his inculpatory statements. Therefore, we must determine whether defendant was "interrogated" by the investigator in violation of his *Miranda* rights. Interrogation refers to express questioning and to any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating statement. *Rhode Island v Innis*, 446 US 291, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). Statements made voluntarily by persons in custody do not fall within the purview of *Miranda*. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

The record shows that defendant made the inculpatory statements in reaction to the investigator's statement to an officer about needing to retrieve the weapon. After defendant's initial statements, the investigator administered *Miranda* warnings to defendant, and defendant's statements followed. In *Innis*, *supra* at 302-303, the United States Supreme Court found that the defendant was not interrogated within the meaning of *Miranda* when police officers voiced safety concerns about handicapped children finding the weapon from the crime and the defendant interrupted them to say he would show them where the gun was located. Similarly, in this case, the apparent purpose of the investigator's statement was to inform another officer of their need to find the weapon. Defendant spontaneously said, "I had a weapon and I fired some shots and I threw the weapon away," or "(the weapon) is not in there, I already got rid of it. You don't have to tear my mother's house up." Like the situation in *Innis*, here, there was no explicit questioning of defendant; the investigator's statement to the police officer was nothing more than a dialogue between them to which no response from defendant was invited. *Id.* Pursuant to *Innis*, we conclude that defendant's initial statements were not made in response to an interrogation, and thus, he was not deprived of his *Miranda* rights.

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Moreover, defendant was not subjected to the "functional equivalent" of questioning, since it cannot be said that the officers should have known that their conversation was "reasonably likely to elicit an incriminating response" from defendant. *Innis, supra* at 302-303. There is nothing in the record to suggest that the investigator was aware that defendant was "peculiarly susceptible" to a search of his mother's house, or that he knew that defendant was "unusually disoriented or upset at the time of his arrest." *Id.* Furthermore, the record does not indicate that, in the context of one brief statement made to another officer, the investigator should have known that defendant would suddenly make a self-incriminating response. *Id.* As in *Innis*, it may be at best said that defendant was subjected to "subtle compulsion," but it was not established that defendant was subjected to conduct that the police should have known was likely to elicit an incriminating response. *Id.* Accordingly, the trial court did not commit plain error in failing to suppress defendant's custodial statements. *Carines, supra* at 763.

Because defendant's initial statements were properly obtained, his "fruit of the poisonous tree" argument regarding his subsequent statements and actions also fails. *Raper, supra* at 481, citing *Oregon v Elstad*, 470 US 298, 309; 105 S Ct 1285; 84 L Ed 2d 222 (1985).

Defendant also contends that trial counsel was ineffective for failing to move to suppress his statements to the police. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Because defendant failed to request a *Ginther*[3] hearing, this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

After a review of the entire record, we conclude that a motion to suppress would not have been successful with regard to the spontaneous statements made by defendant. As we concluded *supra*, the evidence does not indicate that the statements resulted from any interrogation by the officer. Rather, the record shows that defendant spontaneously made the incriminating statements. Under these circumstances, *Miranda* warnings were not required, and the statements were not subject to suppression. *Raper, supra* at 480. Trial counsel will not be deemed ineffective for failing to advocate a meritless position or failing to bring a fruitless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). We therefore conclude that defense counsel's failure to move to suppress defendant's voluntary statements does not constitute ineffective assistance of counsel.

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage